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1) Appeal Brief (9 pages)

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Inventor(s): Jonathan P. Brennan

S.N.: 09/824,454

Filed: April 2, 2001

Case: 8047

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 09/824,454
Applicant(s) : Jonathan P. Brennan
Filed : April 2, 2001
Title : Soft, Thick, Non-Linting Nonwovens
TC/A.U. : 1771
Examiner : Arden B. Sperty
Conf. No. : 9506
Docket No. : 8047
Customer No. : 27752

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APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir,

This Brief is filed pursuant to the appeal from the Final Office Action of the U.S. Patent and Trademark Office (Paper No. 20050525, which was mailed on June 3, 2005). A timely Notice of Appeal was filed on September 6, 2005. Since November 6, 2005 falls on a non-business day, this Brief is believed to be timely filed on the next business day of Monday November 7, 2005.

REAL PARTY IN INTEREST

The real party of interest is The Procter & Gamble Company of Cincinnati, Ohio.

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1-5 and 8 are pending in the present application and have been rejected. Claims 6 and 7 have been cancelled.

Claims 1-5 and 8 are appealed. A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

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STATUS OF AMENDMENTS

No amendment was filed subsequent to the Final Office Action mailed on June 3, 2005.

SUMMARY OF CLAIMED SUBJECT MATTER

The present invention relates to a multi-layer nonwoven web suitable for use as a wet wipe. Page 4, line 31 – page 5, line 12. The web comprises a first carded fibrous outer layer (page 9, lines 22-23) comprising from about 10% to about 60% conjugate fiber (page 7, lines 15-26), from about 20% to about 65% cellulosic fibers (page 4, lines 8-9 and page 8, lines 4-5). The web comprises a fibrous inner layer comprising from about 10% to about 60% conjugate fiber (page 7, lines 26-28), from about 10% to about 90% cellulosic fibers (page 8, lines 14-17). The inner layer is bonded at discrete bond sites to said first outer layer in a face to face relationship (page 4, lines 9-10 and page 7, lines 11-13). The web comprises a second carded fibrous outer layer (page 9, lines 24-25) comprising from about 10% to about 60% conjugate fiber, from about 20% to about 65% cellulosic fibers (page 4, lines 11-13 and page 8, lines 4-5). The said second fibrous outer layer bonded at discrete bond sites to said inner layer in a face to face relationship (page 4, lines 12-13 and page 7, lines 11-13).

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

Claims 1-2 and 8 are rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,505,719 to Cohen et al. (hereafter "Cohen").

Claims 3-5 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Cohen.

ARGUMENTS

- I. Claims 1-2 and 8 are rejected under 35 U.S.C. § 102(b) as being anticipated by Cohen.

In support of the rejection, the Office offered the following argument in paragraph 3 of the Office Action mailed July 2, 2004:

[Cohen] teaches a first layer (first outer layer) comprising synthetic bicomponent fibers and natural fibers. The synthetic fibers are contained in an amount of 10-100 wt%. The natural fibers are contained in an amount of 0-90 wt%. The disclosed ranges

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encompass the claimed ranges. Either the second or the third layer taught by the reference corresponds with Applicant's claimed inner layer. The second and third layers comprise 10-100 wt% synthetic fibers and 0-90 wt% natural fibers. The synthetic and natural fibers are selected from the same fibers as those of the first layer. The fourth layer corresponds to Applicant's claimed outer layer, and comprises 10-100 wt% synthetic fibers and 0-90 wt% natural fibers. The synthetic and natural fibers are selected from the same fibers as those of the first layer. The reference teaches card-and-bind (carded) method for making the nonwoven layers. . . . The reference further teaches embossing along the edges and in a random pattern across the web. [Citations omitted]

While Appellant does not dispute the Office's characterization of Cohen, Appellant believes that it is imported to summarize what Cohen teaches. Cohen relates to a multilayered absorbent structure having a plurality of planar absorbent regions defined by decreasing pore size with increasing depth in the planar region." Col. 4, lines 12-15. Cohen presents a four layer laminate with the following composition:

- First Layer comprising 10-100 wt% synthetic fibers and 0-90 wt% natural fibers.
- Second Layer comprising 10-100 wt% synthetic fibers and 0-90 wt% natural fibers.
- Third Layer comprising 10-100 wt% synthetic fibers and 0-90 wt% natural fibers.
- Fourth Layer comprising 10-100 wt% synthetic fibers and 0-90 wt% natural fibers.

Col. 5, line 53 – Col. 8, line 26. Cohen states that "synthetic fiber-rich structures can be . . . formed with conventional air-laid equipment, such as card-and-bind equipment." Col. 8, lines 55-58.

A. Cohen does not teach or suggest each and every element recited in Claim 1.

Case law states that, "A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of Cal.*, 814 F.2d 628, 631, 2 U.S.P.Q.2d 1051, 1053 (Fed. Cir. 1987); *see also* MPEP § 2131. Case law further states, "For a prior art reference to anticipate in terms of 35 U.S.C. § 102, every element of the claimed invention must be *identically* shown in a single reference." *Diversitech Corp. v. Century Steps, Inc.*, 850 F.2d 675, 677, 7 U.S.P.Q.2d 1315 (Fed. Cir. 1988) (emphasis added). However, Cohen fails to identically teach each element set forth in Claim 1 of the present application.

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Claim 1 states, in part, "said inner layer bonded at discrete bond sites to said first outer layer in a face to face relationship . . . said second fibrous outer layer bonded at discrete bond sites to said inner layer in a face to face relationship." The Office asserts that Cohen teaches these elements. As presented above, Cohen teaches a four layer absorbent structure with the possibility of subsequent layers. The Office states that Cohen teaches a first layer that corresponds to Appellant's first fibrous outer layer, a second or third layer that corresponds to Appellant's fibrous inner layer, and a fourth layer that corresponds Appellant's claimed outer layer. Cohen does not teach an inner layer that is bound in face-to-face relationship to the first outer layer *and* the second outer layer. If the second layer of Cohen is considered to correspond to Appellant's inner layer, the second layer is not bound in a face-to-face relationship to the fourth layer, which the Office states corresponds to Appellant's second outer layer. If the third layer of Cohen is considered to correspond to Appellant's inner layer, the third layer is not bound in a face-to-face relationship to the first layer, which the Office states corresponds to Appellant's first outer layer. Regardless of how the structure of Cohen is viewed by the Office, Cohen fails to teach "said inner layer bonded at discrete bond sites to said first outer layer in a face to face relationship . . . said second fibrous outer layer bonded at discrete bond sites to said inner layer in a face to face relationship." As a result, Cohen fails to anticipate Claim 1.

B. The Office Misconstrues Cohen as Teaching Sublayers that may be Combined to Anticipate Claim 1.

In the Office Action mailed December 17, 2004, the Office withdrew the anticipation rejection (*See* page 2, paragraph 1.), but in a following paragraph (*See* page 2, paragraph 3) the Office reinstates the rejection as follows, "The Cohen reference teaches outer layers, and the second and third layers, in combination, are analogous to the inner layer claimed by Appellant. In other words, the second and third layers are essentially sublayers that in combination are equivalent to the claimed inner layer." This rejection was repeated in the Final Office Action mailed June 3, 2005. The Office misconstrues Cohen on at least two grounds.

First, Cohen rebuts the assertion that the second and third layers are merely sublayers that can be combined as a single layer. Cohen states that "each planar region is defined by a generally decreasing average pore size." Col. 4, lines 27-28. The use of varying pore sizes is believed to be necessary for "improv[ing] the sequestering of liquids

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within the absorbent structure.” Col. 4, lines 33-34. Therefore, the second and third layers having distinct pore sizes are required to provide the requisite functionality. The Office should not equate the second and third layers of Cohen as indistinguishable when they are clearly disclosed as being distinct.

Second, the Office’s combination of the second and third layers to be equivalent to Appellant’s inner layer is arbitrary. The Office has provided no reason why the second and third layers should be considered capable of combination. The Office asserts that the second and third layers can be considered sublayers. Given the Office’s reasoning, presumably any of the layers presented in Cohen could then be combined. Assuming *arguendo* that the second and third layers of Cohen are merely sublayers, Appellant asserts that the first, second, third, and fourth layers of Cohen can just as reasonably be considered sublayers, which then results in a single layer structure that does not teach the elements presented in Appellant’s Claim 1.

Additionally, in the Final Office Action mailed June 3, 2005 (see page 3, paragraph 4), the Office address the Appellant’s argument that the second and third layers of Cohen are not analogous. The Office states, “The argument is not persuasive because the ‘comprising’ language of the claim does exclude a multilayer inner layer.” The Office is correct that Appellant uses the “comprising” transitional phrase in Claim 1. However, the Office’s argument is a diversion. It is irrelevant that Appellant’s claim language is open-ended. The issue is that the Office has failed to present a reference that identically teaches every element of Claim 1.

C. Cohen does not teach or suggest each and every element recited in Claim 8.

The Office has failed to point to a passage within Cohen that teaches the “web is formed in the absence of adhesive.” As a result, the Office has failed to present a single reference that teaches each and every element of the present claim.

II. Claims 3-5 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Cohen.

With regard to the rejection of Claims 3-5, the Office states:

While the Cohen reference is not concerned with the properties of claims 3-5, the invention is used in the same capacity as the claimed invention (as an absorbent composite) and is made of the same materials. It would therefore be obvious to one of ordinary skill in the art to optimize the claimed properties.

Appellant asserts that this rejection is invalid for at least two reasons.

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A. The Office has failed to apply the *Graham* factors to the rejection of Claims 3-5

The Office has not applied the *Graham* factors as enunciated in *Graham v. John Deere*, 383 U.S. 1 (1966). There appears to be no determination of the differences between Cohen and Appellant's claims. There appears to be no resolution as to the level of ordinary skill in the pertinent art. Since the Office has not applied the *Graham* factors, a *prima facie* case of obviousness has not been established.

B. The Office has failed to teach or suggest all the elements presented in Claim 3-5.

Claims 3-5 are dependent from and include all the element of Claim 1. As presented above, the Office has failed to present evidence that Cohen teaches or suggests each and every element of Appellant's Claim 1. Namely, Cohen does not teach or suggest the multi-layer web of the present invention. Since Claim 1 is nonobvious in light of the arguments presented above, Claims 3-5 are likewise nonobvious.

SUMMARY

In view of the discussion and arguments presented above, it is respectfully submitted that Claims 1-2 and 8 have not been properly rejected under 35 U.S.C. § 102(b) and that Claims 3-5 have not been properly rejected under 35 U.S.C. § 103(a). Appellant respectfully requests the Board of Patent Appeals and Interferences to reverse the rejections of Claims 1-5 and 8 and to remand the application with instructions that these claims be allowed over the cited documents.

Respectfully submitted,

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Date: November 7, 2005
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CLAIMS APPENDIX

1. A multi-layer nonwoven web suitable for use as a wet wipe, the web comprising:
 - (a) a first carded fibrous outer layer comprising from about 10% to about 60% conjugate fiber, from about 20% to about 65% cellulosic fibers;
 - (b) a fibrous inner layer comprising from about 10% to about 60% conjugate fiber, from about 10% to about 90% cellulosic fibers, said inner layer bonded at discrete bond sites to said first outer layer in a face to face relationship; and
 - (c) a second carded fibrous outer layer comprising from about 10% to about 60% conjugate fiber, from about 20% to about 65% cellulosic fibers, said second fibrous outer layer bonded at discrete bond sites to said inner layer in a face to face relationship.
2. The nonwoven web of Claim 1, wherein said first and second outer layer comprise identical fiber compositions.
3. The nonwoven web of Claim 1, wherein said first and second outer layers together comprise from about 20% to about 80% of the total basis weight of the web.
4. The nonwoven web of Claim 1, wherein said first and second outer layers each comprise from 20% to about 60% of the total basis weight of the web.
5. The nonwoven web of Claim 1, wherein said inner layer comprises from about 33% to about 80% of the total basis weight of the web.
6. (Cancelled)
7. (Cancelled)
8. The nonwoven web of Claim 1, wherein said web is formed in the absence of adhesive.

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EVIDENCE APPENDIX

None

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RELATED PROCEEDINGS APPENDIX

There are no known related appeals, interferences, or judicial proceedings.